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No. 04-105

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

DUCAN FANFAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court violates the Fifth and Sixth Amendments by relying upon facts that increase the maximum sentence available under the United States Sentencing Guidelines (other than the fact of a prior conviction) when those facts were not charged in the indictment and either found by the jury on proof beyond a reasonable doubt or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: What role do the Sentencing Reform Act, the Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal criminal sentencing?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT 4

I. CERTIORARI BEFORE JUDGMENT IS NOT JUSTIFIED HERE 7

A. The United States Offers Virtually No Reason For Granting Certiorari Before Judgment 7

B. This Case Does Not Satisfy This Court's Standards For Granting Certiorari Before Judgment 8

C. This Case Is An Unsuitable Vehicle For Review Of The Proposed Questions In Any Event 11

II. OTHER, MORE APPROPRIATE VEHICLES ARE AVAILABLE 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Page(s)

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 6, 13
Bijou v. *United States*, U.S. No. 04-5272 (petition for certiorari filed July 19, 2004) 5, 14
Blakely v. *Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004) ..... *passim*
Bolling v. *Sharpe*, 344 U.S. 873 (1952) 10
Brown v. *Board of Education*, 344 U.S. 1 (1952) 10
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 15
Chisom v. *Roemer*, 501 U.S. 380 (1991) 10
Clark v. *Roemer*, 501 U.S. 1246 (1991) 10
Coleman v. *PACCAR, Inc.*, 424 U.S. 1301 (1976) 7
Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 8
Edwards v. *United States*, 523 U.S. 511 (1998) 6, 12
Goodine v. *United States*, 124 S. Ct. 1600 (2004) (mem.) 12
Gratz v. *Bollinger*, 539 U.S. 244 (2003) 9, 10
Greene v. *McElroy*, 360 U.S. 474 (1959) 10
Grutter v. *Bollinger*, 539 U.S. 306 (2003) 10
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 13
Microsoft Corp. v. *United States*, 530 U.S. 1301 (2000) (mem.) 11
Mistretta v. *United States*, 488 U.S. 361 (1989) 9, 16
NOW v. *Idaho*, 455 U.S. 918 (1982), *vacated as moot*, 459 U.S. 809 (1982) 9
Ring v. *Arizona*, 536 U.S. 584 (2002) 6
Siegel v. *LePore*, 531 U.S. 1005 (2000) (mem.) 11
Taylor v. *McElroy*, 360 U.S. 709 (1959) 10
United States v. *Ameline*, No. 02-30326, 2004 WL 1635808 (9th Cir. July 21, 2004) 5, 16
United States v. *Bijou*, 92 Fed. Appx. 966 (4th Cir. 2004) (per curiam) (unpublished), *pet. for cert. filed*, No. 04-5272 (U.S. July 19, 2004) 14, 15

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Booker*, No. 03-4225, 2004 WL 1535858 (7th Cir. July 9, 2004), *pet. for cert. filed*, No. 04-104 (U.S. July 21, 2004) 5, 15
United States v. *Brough*, 243 F.3d 1078 (7th Cir.), *cert. denied*, 534 U.S. 889 (2001) 13
United States v. *Clinton*, 524 U.S. 912 (1998) (mem.) 11
United States v. *Cotton*, 535 U.S. 625 (2002) 12
United States v. *Goodine*, 326 F.3d 26 (1st Cir. 2003), *cert. denied*, 124 S. Ct. 1600 (2004) 13
United States v. *Johnson*, 682 F. Supp. 1033 (W.D. Mo. 1988), *cert. granted before judgment sub nom. United States* v. *Mistretta*, 486 U.S. 1054 (1988) 9
United States v. *Montgomery*, No. 03-5256, 2004 WL 1562904 (July 14, 2004), *reh'g and reh'g en banc granted, opinion vacated by* 2004 U.S. App. LEXIS 15017 (July 19, 2004), *dismissed by* 2004 WL 1637660 (6th Cir. July 23, 2004) 5
United States v. *Mooney*, No. 02-3388, 2004 WL 1636960 (8th Cir. July 23, 2004) 5, 16
United States v. *Nixon*, 418 U.S. 683 (1974) 9
United States v. *Patterson*, 38 F.3d 139 (4th Cir. 1994) 13
United States v. *Penaranda*, Nos. 03-1055(L), 03-1062(L), 2004 WL 1551369 (2d Cir. July 12, 2004), *certification docketed*, No. 04-59 (U.S. July 13, 2004) 5
United States v. *Pineiro*, No. 03-30437, 2004 WL 1543170 (5th Cir. July 12, 2004), *pet. for cert. filed*, No. 04-5263 (U.S. July 14, 2004) 5, 14, 17
United States v. *Rubin*, 524 U.S. 912 (1998) (mem.) 11
United States v. *Vazquez*, 271 F.3d 93 (3d Cir. 2001) 6
Vazquez v. *United States*, 536 U.S. 963 (2002) (mem.) 12
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 937 (1952) 17

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND RULES

18 U.S.C. § 922(g) 14
18 U.S.C. § 924(c) 14
18 U.S.C. § 3553(a) 16
18 U.S.C. § 3553(b) 16
18 U.S.C. § 3553(c) 16
18 U.S.C. § 3584 15
18 U.S.C. § 3742 16
21 U.S.C. § 841 ..... *passim*
21 U.S.C. §§ 841-846 13
21 U.S.C. § 846 ..... 1, 6, 12, 13
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1254(2) 5
28 U.S.C. § 2101(e) 1
S. Ct. R. 11 ..... *passim*

OTHER AUTHORITIES

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 11
United States Sentencing Guidelines
§ 2D1.1(c), note (D) 2
§ 2D1.1(c)(3) 3
§ 3B1.1(c) 3
§ 4A1.1 3
§ 5A 3
§ 5G1.2(d) 14

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BRIEF IN OPPOSITION

OPINION BELOW

The sentencing proceedings in the district court (Pet. App. 1a-13a) are unreported. There has been no decision by the court of appeals.

JURISDICTION

The judgment of the district court was entered on June 30, 2004. Pet. App. 16a-21a. The notice of appeal was filed on July 16, 2004, and the court of appeals docketed the case as No. 04-1946 on July 19, 2004. Pet. App. 26a-27a. On July 21, 2004, the United States petitioned for a writ of certiorari before judgment under 28 U.S.C. §§ 1254(1) and 2101(e).

COUNTERSTATEMENT OF THE CASE

On June 11, 2003, a grand jury sitting in the District of Maine charged Ducan Fanfan in a one count indictment with conspiracy to distribute 500 grams or more of cocaine hydrochloride in violation of 21 U.S.C. § 846. To prove this conspiracy charge at trial, the government presented the testimony of Donovan Thomas, a cooperating co-defendant.[1]

Thomas testified that he had purchased cocaine hydrochloride in the past from Fanfan. Thomas also testified that he had attempted to purchase cocaine hydrochloride and cocaine base from Fanfan *after* agreeing to cooperate with the government, even though the district court had ruled that any conspiracy would have ended when Thomas began to cooperate, and even though Fanfan had not been charged with this attempted sale. The jury also heard testimony that Fanfan had been in possession of cocaine hydrochloride and cocaine base at the time of his arrest. On October 9, 2003, the jury returned a guilty verdict on the single charge of conspiracy to distribute more than 500 grams of cocaine hydrochloride. Pet. App. 15a.

At the sentencing hearing, the government introduced further evidence regarding cocaine base, including hearsay testimony that Fanfan had sold cocaine base to Thomas in the past, and contended that Fanfan's sentence should be increased.[2] Fanfan objected that, under this Court's opinion in *Blakely* v. *Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004), the government should have charged a crime related to cocaine base in the indictment and proven it to the jury

[1] Federal agents arrested Thomas after he attempted to collect money from another cooperating co-defendant. After his arrest, Thomas agreed to cooperate with the government.

[2] Under the Controlled Substances Act, "cocaine base" is a different "substance" from "cocaine," and offenses involving cocaine base are subject to radically different penalties. *Compare, e.g.*, 21 U.S.C. § 841(b)(1)(B)(ii) *with id.* § 841(b)(1)(B)(iii). The Guidelines, on the other hand, draw a dividing line between the particular form of cocaine base known as "crack," and all other forms of cocaine, treating crack much more harshly. *See* Guideline § 2D1.1(c), note (D).

beyond a reasonable doubt; the only crime presented to the jury was conspiracy to distribute cocaine hydrochloride. Opp. App. 4a-7a.

The district court agreed with Fanfan that this Court's opinion in *Blakely* precluded a sentence increased under the Guidelines based on judicial fact-finding.[3] The court noted that, if *Blakely* applied to the Guidelines, no aspect of the sentencing could be premised on the allegation that Fanfan had possessed cocaine base: "The jury verdict does not permit us to reach a conclusion about crack cocaine. Crack cocaine was not even charged in the indictment." Pet. App. 6a. Nor could the sentence be increased for any amount of cocaine hydrochloride over 500 grams, nor on account of any leadership role that Fanfan allegedly played in the conspiracy: "The verdict from the jury permits no conclusion as to how much above the 500 grams the conspiracy involved. . . . [T]he verdict does not permit us any conclusion as to this defendant's leadership role in the conspiracy." *Id.*

The district court held that, "without those jury findings here . . . , I may not increase the sentence above the 63 to 78 month range to the guideline range I found earlier." Pet. App. 7a. The court went on to state:

> I quote again from the majority opinion [in *Blakely*], "The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the 'unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee," that's me, the Judge, "of the State." . . .

[3] In the interest of judicial economy, the district court also made findings as if the Guidelines applied. It determined drug quantity, resulting in a hypothetical base offense level of 34 under Guideline § 2D1.1(c)(3). It then imposed a two-level upward adjustment for defendant's role under § 3B1.1(c). Finally, it found that Fanfan's criminal history category was I under §§ 4A1.1 and 5A. The ultimate sentencing range was 188-235 months. Pet. App. 2a.

> And, of course, here we're talking about much more than three years.

Pet App. 7a-8a.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

The government asks this court to determine whether, in view of *Blakely* v. *Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004), the federal statutes and rules which require a judge to impose a criminal sentence under the United States Sentencing Guidelines violate the Sixth Amendment, when that sentence is based on facts that were not charged in an indictment, nor proven to a jury beyond a reasonable doubt, nor admitted by the defendant. The government is certainly correct that this question warrants prompt resolution by this Court. But certiorari in *this* case, in which the extraordinary procedure of certiorari before judgment is invoked, is neither necessary nor appropriate. Numerous other vehicles, which have or will soon come to this Court in the ordinary course—*after* judgment in a court of appeals—squarely present this question.

Under this Court's Rule 11, "[a] petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that *the case* is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." (Emphasis added.) The government has not met that high burden.

In support of certiorari in this case, the government argues only that the *Blakely* question is important. Pet. 6-9. If it were true that this Court would be unable to address the significant questions presented in the government's petition without granting certiorari before judgment, or even if there were substantial risk that a vehicle problem in another case might stand as an obstacle to this Court's resolution of these issues, then certiorari before judgment in this case might well be justified. But the questions presented herein

are squarely raised in many other cases that have already reached or can reach this Court in the ordinary course. There is thus no reason for this Court to depart from its usual practice of demanding strict compliance with Rule 11.

For example, *Bijou* v. *United States*, U.S. No. 04-5272 (petition for certiorari filed July 19, 2004), involves a defendant who was sentenced, over his Fifth and Sixth Amendment objections, to 240 months in prison—rather than the 105-month maximum that the Guidelines would have allowed simply for the crimes of conviction—based on judicial factfinding that required a Guidelines "cross-reference." There are also numerous other potential vehicles: Five courts of appeals have issued opinions addressing the application of *Blakely* to the Sentencing Guidelines,[4] at least two of which are the subjects of pending petitions for writs of certiorari in this Court,[5] and there are likely hundreds of cases like this

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[4] *Compare United States* v. *Booker*, No. 03-4225, 2004 WL 1535858 (7th Cir. July 9, 2004) (holding that *Blakely* renders judicial factfinding under the Guidelines unconstitutional and remanding severability issue), *pet. for cert. filed*, No. 04-104 (U.S. July 21, 2004); *United States* v. *Mooney*, No. 02-3388, 2004 WL 1636960 (8th Cir. July 23, 2004) (holding that *Blakely* renders judicial factfinding under the Guidelines unconstitutional and that the Guidelines are not severable); *and United States* v. *Ameline*, No. 02-30326, 2004 WL 1635808 (9th Cir. July 21, 2004) (holding that *Blakely* renders portions of the Guidelines unconstitutional and that those unconstitutional portions are severable), *with United States* v. *Pineiro*, No. 03-30437, 2004 WL 1543170 (5th Cir. July 12, 2004) (holding that the lower courts are not empowered to declare whether *Blakely* renders the Guidelines unconstitutional, in light of this Court's prior cases), *pet. for cert. filed*, No. 04-5263 (U.S. July 14, 2004); *see also United States* v. *Montgomery*, No. 03-5256, 2004 WL 1562904 (July 14, 2004), *reh'g and reh'g en banc granted, opinion vacated by* 2004 U.S. App. LEXIS 15017 (July 19, 2004), *dismissed by* 2004 WL 1637660 (6th Cir. July 23, 2004).

Under 28 U.S.C. § 1254(2), the en banc Court of Appeals for the Second Circuit has certified to this Court three questions regarding the application of *Blakely* to the Guidelines. *See United States* v. *Penaranda*, Nos. 03-1055(L), 03-1062(L), 2004 WL 1551369 (2d Cir. July 12, 2004) (en banc), *certification docketed*, No. 04-59 (U.S. July 13, 2004).

[5] *See United States* v. *Booker*, U.S. No. 04-104; *United States* v. *Pineiro*, U.S. No. 04-5263.

one, in which sentencing decisions have been challenged in the courts of appeals.[6] As further described in the Brief *Amici Curiae* of the National Association of Criminal Defense Lawyers and National Association of Federal Defenders, several of these cases present this Court with a better opportunity to resolve the questions the government seeks to have this Court answer.

Moreover, this case has significant vehicle problems in its own right. To reach the *Blakely* question in this case, this Court would first need to address the knotty, and logically antecedent, question whether 21 U.S.C. §§ 841 and 846 violate the Sixth Amendment because they require judges to impose gradually higher sentences after finding facts about drug type and quantity by a preponderance of the evidence, or whether, on the other hand, those provisions are properly construed to define a set of greater and lesser offenses with different elements according to drug type and amount. This question was raised but, in reliance on the Guidelines' "relevant conduct" provisions, not answered in *Edwards* v. *United States*, 523 U.S. 511, 516 (1998) ("[W]e need not, and we do not, consider the merits of petitioners' statutory and constitutional claims."); *see also Edwards* Pet. Br., No. 96-8732, 1997 WL 793079, at *32 (U.S. Dec. 17, 1997); *United States* v. *Vazquez*, 271 F.3d 93, 107-115 (3d Cir. 2001) (en banc) (Becker, C.J., concurring).

Given this obstacle, and in view of the array of other, more appropriate vehicles that are already pending before this Court, or that the United States could bring before this Court, there is no reason to take the exceptional step of granting certiorari before judgment here.

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[6] *Blakely*, after all, was an application of *Ring* v. *Arizona*, 536 U.S. 584 (2002), which in turn was an application of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Many defense lawyers have therefore been preserving objections of this nature in cases arising during the last four years.

I. CERTIORARI BEFORE JUDGMENT IS NOT JUSTIFIED HERE

A. The United States Offers Virtually No Reason For Granting Certiorari Before Judgment

Certiorari before judgment is an "extremely rare occurrence." *Coleman* v. *PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J.). Accordingly, this Court's Rule 11 requires that the petitioner "show[] that the case is of such imperative public importance as to justify deviation from normal appellate practice . . . ." The government has not made such a showing.

Notably, in the section of the petition titled "A Grant Of Certiorari Before Judgment And Expedited Consideration Is Warranted In The Exceptional Circumstances Of This Case," the government does not, in fact, discuss any exceptional circumstances *of this case*. Pet. 8-10. Instead, the government emphasizes "the urgent need for this Court's resolution of the questions presented" and goes on to present a schedule for expedited review. Pet. 9-10.

The government does give two reasons for granting review in this case elsewhere in the petition. Pet. 8. First, the government points out that, unlike *Booker*, "this case has the advantage of arising from a decision in which the sentencing court resolved both questions presented in the petition." *Id.*; *see also* Pet. 7. Thus, the government contends, this case would permit this Court to resolve the question whether the Guidelines are severable. But, as we discuss more fully below, other vehicles present this question without requiring this Court to take the extraordinary step of granting certiorari before judgment.

Second, the government contends (Pet. 8) that "[g]ranting certiorari in both cases would protect against any possibility that later impediments to review in one or the other case might prevent timely resolution of the issues." It may be true that, in view of the practical importance of obtaining a prompt resolution of the questions presented, prudence counsels in favor of granting certiorari in more than one case, simply to guard against the risk that a barrier to review may arise in any single case. And if it

were not possible to bring appropriate cases to this Court absent invocation of the exceptional certiorari before judgment procedure, perhaps it would even be appropriate under the circumstances to consider certiorari before judgment. But suitable vehicles are now pending before this Court, having arrived here by the usual route after resolution by the court of appeals, and squarely presenting the very questions on which the government has sought certiorari. The unusual step of certiorari before judgment would therefore be inappropriate.

The United States simply has not made, and indeed cannot make, the showing required by Supreme Court Rule 11, that *this case* "is of such imperative public importance as to justify" a departure from this Court's usual practices.

B. This Case Does Not Satisfy This Court's Standards For Granting Certiorari Before Judgment

This Court has seldom granted certiorari before judgment. A review of those cases demonstrates the burden placed on a petitioner who would invoke Rule 11.

1. The cases in which the Court has granted petitions for certiorari before judgment naturally raise questions of enormous national significance. But many also reflect this reality: Few other vehicles existed for reaching the issue at hand in the time available. For example, in *Dames & Moore* v. *Regan*, the Court faced a potential international crisis in a case involving an executive agreement that created an Iran-United States Claim Tribunal to resolve American claims against Iranian assets previously frozen during the hostage crisis. The Court "granted certiorari before judgment . . . because lower courts had reached conflicting conclusions on the validity of the President's actions and . . . unless the Government acted by July 19, 1981, Iran could consider the United States to be in breach of the Executive Agreement." 453 U.S. 654, 660 (1981).[7]

[7] Similarly, in *NOW* v. *Idaho*, this Court granted certiorari before judgment in what was apparently the only case that had found unconstitutional Congress's extension of the deadline for state ratification of the Equal Rights Amendment. *See* 455 U.S. 918 (1982) (granting review of *Idaho* v. *Freeman*, 478 F. Supp. 33 (1979), 507 F. Supp. 706 (1981), 529 F. Supp. 1107 (1981)). Even so, the new deadline passed before a sufficient number of states had ratified the Amendment, and the Court vacated the case as moot. 459 U.S. 809 (1982).

In *United States* v. *Nixon*—the Nixon tapes case—the Court confronted a crisis in the Presidency and "granted both the United States' petition for certiorari before judgment . . . and also the President's cross-petition for certiorari before judgment . . . because of the public importance of the issues presented and the need for their prompt resolution." 418 U.S. 683, 686-687 (1974). And in *Mistretta* v. *United States*, which concerned the constitutionality of the United States Sentencing Commission, this Court granted certiorari before judgment "[b]ecause of the 'imperative public importance' of the issue, as prescribed by the Rule, and because of the disarray among the Federal District Courts . . . ," 488 U.S. 361, 371 (1989). Moreover, in the case below, the question had been decided by an extraordinary opinion expressing the views of four district court judges (and the dissent of a fifth). *See United States* v. *Johnson*, 682 F. Supp. 1033 (W.D. Mo. 1988).

This case presents none of the same imperatives. For one, the Court could certainly resolve the questions presented by granting review solely in *Booker*. In addition, as explained *infra* Part II, insofar as this Court believes that certiorari in a second case is either necessary or appropriate, numerous other cases present more suitable vehicles than this one.

2. The Court has also granted certiorari before judgment in cases that provide necessary counterparts to important cases that themselves reached this Court in the ordinary course. For example, *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), which is apparently the only case since *Mistretta* in which this Court granted plenary review using certiorari

before judgment,[8] reached this Court by this means. *Gratz* involved an equal protection challenge to the University of Michigan's undergraduate admissions program. Certiorari was granted in *Gratz* on the same day that it was granted in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), a case making an equal protection challenge to the University of Michigan Law School's admissions program. These two cases were companion cases in every sense: They involved overlapping defendants, the parties were represented by the same counsel, and they were argued on the same day before the en banc Sixth Circuit (with that court inexplicably deciding the *Grutter* case but leaving the *Gratz* case unresolved). This Court explained that it had granted certiorari before judgment in *Gratz* "despite the fact that the Court of Appeals had not yet rendered a judgment, so that this Court could address the constitutionality of the consideration of race in university admissions in a wider range of circumstances." 539 U.S. at 259-260.

Similarly, this Court *invited* a petition for certiorari before judgment in the case *Bolling* v. *Sharpe*, taking judicial notice of its pendency in the United States Court of Appeals for the District of Columbia Circuit and noting the desirability of its resolution with *Brown*. *See Brown* v. *Board of Educ.*, 344 U.S. 1, 3 (1952); *Bolling* v. *Sharpe*, 344 U.S. 873 (1952) (granting petition for certiorari before judgment).[9]

[8] In 1991, this Court granted certiorari before judgment to vacate and remand in light of *Chisom* v. *Roemer*, 501 U.S. 380 (1991). *See Clark* v. *Roemer*, 501 U.S. 1246 (1991).

[9] This Court also granted certiorari before judgment in *Taylor* v. *McElroy*, 360 U.S. 709 (1959) "because of the pendency here of *Greene* v. *McElroy*." *Id.* at 710. *Greene* posed the question whether the revocation of a security clearance without notice and hearing violated the Due Process Clause, a question the U.S. Court of Appeals for the D.C. Circuit had found nonjusticiable. *See* 360 U.S. 474 (1959). As Stern and Gressman note, certiorari before judgment in *Taylor* was likely considered appropriate because the cases "involved essentially the same important constitutional issues" and because "*Taylor* was then pending in the same court of appeals as had decided the *Greene* case." Robert L. Stern et al., *Supreme Court Practice* 262 n.65 (8th ed. 2002).

Unlike *Gratz* to *Grutter*, or *Bolling* to *Brown*, this case is not a logical companion to *Booker*—at least no more so than any of the hundreds of cases now pending in the courts of appeals that involve Sixth Amendment challenges to the application of the Sentencing Guidelines. Unlike *Grutter* and *Gratz*, *Booker* and *Fanfan* do not arise from a related set of facts; they do not even arise from the same jurisdiction. And unlike *Bolling*, *Fanfan* provides no distinctive legal opportunity—there is nothing to distinguish it from other cases that would give this Court the opportunity to answer the questions presented in the petition.

3. Nor does the national importance of a question alone justify granting certiorari before judgment in a particular case, as this Court's actions repeatedly demonstrate. Adhering to the language of its Rule 11, this Court refused to grant certiorari before judgment in the Microsoft antitrust case, despite concern for the effect of the case on the national economy. *See Microsoft Corp.* v. *United States*, 530 U.S. 1301 (2000) (mem.). And the Court rejected the Office of Independent Counsel's petition in 1998 in proceedings regarding the ability of the President to invoke attorney-client privilege regarding conversations with government lawyers about private lawsuits.[10]

C. This Case Is An Unsuitable Vehicle For Review Of The Proposed Questions In Any Event

Certiorari before judgment is improper here for the additional reason that this case raises logically antecedent issues that may well prevent resolution of the question the

[10] *See United States* v. *Clinton*, 524 U.S. 912, 912 (1998) (mem.) ("Petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit before judgment denied without prejudice. It is assumed that the Court of Appeals will proceed expeditiously to decide this case."); *United States* v. *Rubin*, 524 U.S. 912 (1998) (mem.) (same); *see also Siegel* v. *LePore*, 531 U.S. 1005 (2000) (mem.) (denying certiorari before judgment in the Florida election dispute).

petition seeks to bring before this Court. Specifically, to reach the *Blakely* question here, this Court would be required to address the preliminary question whether 21 U.S.C. §§ 841 and 846 are themselves unconstitutional because they can be read to establish graduated statutory sentence levels—antecedent to the Guidelines—in apparent reliance on judicial fact-finding using a preponderance standard. This Court was faced with this question in *Edwards* v. *United States*, 523 U.S. 511 (1998), but was not required to resolve it there,[11] given the Court's reliance on the Guidelines' "relevant conduct" rule—the very provision placed in constitutional doubt here. The same vexed issue was pretermitted in *United States* v. *Cotton*, 535 U.S. 625 (2002), where the case's plain-error posture permitted the Court to assume, without deciding, an answer to the statutory question. Other petitions raising the question have been denied. *See, e.g., Goodine* v. *United States*, 124 S. Ct. 1600 (2004) (mem.); *Vazquez* v. *United States*, 536 U.S. 963 (2002) (mem.).

That this case necessarily implicates this antecedent question is made clear by the Government's Petition for Certiorari before Judgment, in which it is asserted that, for the crime of Fanfan's conviction—conspiracy to distribute and to possess with intent to distribute 500 or more grams of cocaine—"[t]he maximum penalty . . . is life imprisonment." Pet. 2.[12] Notably, the Government gives no statutory citation for this proposition. That is because life imprisonment can be the maximum penalty for Fanfan's crime only if one assumes a highly doubtful answer to the question that this Court has not answered: Does 21 U.S.C. § 841(a) impose a

[11] *See id.* at 516 ("[W]e need not, and we do not, consider the merits of petitioners' statutory and constitutional claims."); *see also Edwards* Pet. Br., 1997 WL 793079, at *32.

[12] This assertion is made for the first time in the Petition for Certiorari Before Judgment. During the sentencing hearing, the government conceded that the maximum sentence under this indictment was forty years. Opp. App. 4a.

maximum penalty for *all* drug crimes (with § 841(b) providing only "sentencing factors" suggesting lesser punishment in various sorts of drug cases), or does § 841(b) itself establish the minimum and maximum penalties for drug crimes by laying out offense elements that must be alleged and proved to a jury beyond a reasonable doubt?

The government, after *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), and before *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), had consistently argued that § 841(b) established a set of "sentencing factors" for determination by the judge only. *See, e.g., United States* v. *Patterson*, 38 F.3d 139 (4th Cir. 1994). The government then partially retreated from that position after *Apprendi*, relying on the notion of "sentence-enhancing facts," which are to be determined by the jury at trial beyond a reasonable doubt, but which are not understood to be "elements" of different offenses (thus supposedly avoiding complex Double Jeopardy and Confrontation Clause issues, among others). *See, e.g., United States* v. *Brough*, 243 F.3d 1078 (7th Cir.) (reviewing prior cases and revising interpretation of statute after *Apprendi*), *cert. denied*, 534 U.S. 889 (2001); *see also, e.g., United States* v. *Goodine*, 326 F.3d 26 (1st Cir. 2003), *cert. denied*, 124 S. Ct. 1600 (2004). *Blakely* is likely to work a similar alteration of the government's position.

As these complications demonstrate, the status of the Controlled Substances Act after *Blakely* can be answered only by careful analysis of the text, structure, and legislative history of 21 U.S.C. §§ 841-846. Such an analysis would take this Court far afield from *Blakely*'s implications for the United States Sentencing Guidelines, and might even result in a decision that obviates the need to address those questions. Given the need for speedy resolution of the issues raised for the Guidelines by *Blakely*, a case implicating this complicated antecedent question does not present a suitable vehicle. In any event, as set forth below, this Court has ample opportunity to resolve the effect of *Blakely* on the Guidelines in other cases that do not present such difficulties.

II. OTHER, MORE APPROPRIATE VEHICLES ARE AVAILABLE

As further described in the Brief *Amici Curiae* of the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders, other cases present this Court with more appropriate vehicles to address the questions presented in this petition.

1. First, there is at least one suitable vehicle already pending before the Court (and there may be others[13]). *See Bijou* v. *United States*, U.S. No. 04-5272 (petition for certiorari filed July 19, 2004). Jimmy Bijou was charged with three felon-in-possession counts in violation of 18 U.S.C. § 922(g) (two counts involving firearms, and one count charging possession of ammunition in tandem with one of the firearms counts), one count of possession of a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c), and one count of possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841. At trial, however, the district court granted Bijou's motion to exclude evidence supporting the drug charges, finding the government's drug evidence "very unconvincing." *Bijou* Pet. 10.

As a result, the government dismissed the § 924(c) count and the drug count mid-trial, and Bijou pleaded guilty to the felon-in-possession counts. His base offense level for those charges was deemed to be 24 (yielding a Guidelines range of 84-105 months after a deduction for "acceptance of responsibility"), but at sentencing the judge used the very same drug evidence he had found "very unconvincing" at trial to increase the base offense level to 32, resulting in a sentence of 240 months.[14] In both the district court and the

[13] *See, e.g., United States* v. *Pineiro*, U.S. No. 04-5263 (petition for certiorari filed July 14, 2004).

[14] Bijou's sentence comprised two consecutive 120-month sentences, applied to two of his three firearms counts. Those sentences were imposed under Guideline § 5G1.2(d), which commands the sentencing judge to impose consecutive sentences if necessary to reach the Guidelines range arrived at by judicial factfinding. *See United States* v. *Bijou*, 92 Fed. Appx. 966, 966 (4th Cir. 2004) (per curiam) (unpublished). (The statute, on the other hand, makes the choice of consecutive versus concurrent sentencing in multi-count cases discretionary. *See* 18 U.S.C. § 3584.) Thus, once the district court had used the "very unconvincing" drug evidence to arrive at a base offense level of 32, it deemed itself required to impose consecutive sentences to achieve a sentence within that higher Guidelines range.

court of appeals, Bijou invoked *Apprendi* and *Ring* to argue that the sentencing procedures violated his Fifth and Sixth Amendment rights.

To be sure, the Fourth Circuit's opinion issued before *Blakely* and thus does not assess the validity of the Guidelines in light of *Blakely*. *See* 92 Fed. Appx. at 966-967. But as this Court has repeatedly made clear, it "reviews judgments, not opinions," *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), and the correctness of the judgment of the court of appeals in *Bijou* turns on the resolution of the *Blakely* question. Insofar as this Court might find the district court's post-*Blakely* opinion in *Fanfan* helpful or instructive in resolving this question, it would be able to consider the reasoning in that opinion, even on writ of certiorari to the Fourth Circuit in *Bijou*.

2. If this Court would prefer to review a case in which the court of appeal had specifically addressed the question whether *Blakely* applies to the Guidelines, the courts of appeals have moved swiftly to provide such answers. For example, the government filed with the petition in the instant case a petition in *United States* v. *Booker*. In that case, the United States Court of Appeals for the Seventh Circuit held that, under *Blakely*'s reasoning, judicial factfinding to increase sentences under the Guidelines violates the Sixth Amendment right to jury trial and the Due Process right to proof of crime beyond a reasonable doubt; it remanded for the District Court to determine whether the Guidelines were severable. *See United States* v. *Booker*, No. 03-4225, 2004 WL 1535858 (7th Cir. July 9, 2004), *pet. for cert. filed*, No. 04-104 (U.S. July 21, 2004).

On the day the government filed the instant petition, the United States Court of Appeals for the Ninth Circuit also found that *Blakely* precluded sentencing under the Guidelines based on judicial factfinding. *See United States* v. *Ameline*, No. 02-30326, 2004 WL 1635808 (9th Cir. July 21, 2004). Unlike the Seventh Circuit, however, the Ninth Circuit went on to address the question of remedy, holding that the unconstitutional portions of the Guidelines were severable. *See id.* at *11.

Two days later, a divided panel the Court of Appeals for the Eighth Circuit similarly concluded that *Blakely* precluded sentencing under the Guidelines based on judge-found facts. *See United States* v. *Mooney*, No. 02-3388, 2004 WL 1636960 (8th Cir. July 23, 2004). But, in contrast to the Ninth Circuit, the Eighth Circuit concluded that the Guidelines were *not* severable, and remanded to the district court for sentencing, "treating the Guidelines as *non-binding* but advisory unless the defendant consents to a Guidelines sentence," *id.* at *13.

Ameline and *Mooney* thus both present the very question the government wishes this Court to answer through the instant case: the severability of the Guidelines.[15] Both cases also arise from well-reasoned opinions of the courts of appeals. In addition, *Mooney* is not a drug case. Because

[15] That is not to say that either the Ninth Circuit in *Ameline* or the Eighth Circuit in *Mooney* posed the severability question correctly. Both cases asked whether certain provisions of the Guidelines are "severable" from one another. The proper question may instead be whether the section of the Sentencing Reform Act that makes judicial obedience to the Guidelines mandatory, 18 U.S.C. § 3553(b), is severable from other provisions of the Act, such as § 3553(a) (which, in seeming contradiction to subsection (b), makes utilization of the Guidelines advisory), § 3553(c) (which requires that the sentencing court provide reasons for sentences, but requires less stringent justification for sentences compliant with the Guidelines), and § 3742 (which allows appeals of sentences, on standards of review which vary according to whether the court adhered to the Guidelines). *See Mistretta* v. *United States*, 488 U.S. 361, 367 (1989) (identifying these notable features of the Sentencing Reform Act).

the defendants prevailed in *Ameline* and *Mooney*, the government could certainly seek certiorari in either case.[16]

Unlike the present case, further review in one of these cases would offer the Court "the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 937, 938 (1952) (Burton, J., dissenting from grant of certiorari before judgment). In any event, because the demanding standard established by this Court's Rule 11 is not met in this case, certiorari before judgment should be denied.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted,

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[16] The United States Court of Appeals for the Fifth Circuit held in *United States* v. *Pineiro*, No. 03-30437, 2004 WL 1543170 (5th Cir. July 12, 2004), that the lower federal courts are not empowered, in light of *Edwards* and other cases from this Court, to rule that *Blakely* renders the Guidelines unconstitutional.

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MAINE

Docket No. 03-47-P-H

UNITED STATES OF AMERICA

v.

DUCAN FANFAN, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

Pursuant to notice, the above-entitled matter came on for Sentencing Hearing before the HON. D. BROCK HORNBY, in the United States District Court, Portland, Maine, on the 28th day of June, 2004, at 9:36 a.m.

APPEARANCES:

For the Government:

Helene Kazanjian, Esq.

For the Defendant:

Bruce Merrill, Esq.

Rosemary Curran Scapicchio, Esq.

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MS. SCAPICCHIO: Judge, I've had an opportunity to speak to Mr. Fanfan, he'd like to proceed with sentencing today, to be able to argue Blakely, but not necessarily brief it.

MS. KAZANJIAN: I would prefer to brief it, I think, but I can preliminarily explain to the court why.

THE COURT: Go ahead.

MS. KAZANJIAN: Some initial issues. My position is that Blakely does not apply to federal sentencing guidelines. It should not be applied, and for several reasons, and I would—I think it's more complex than I think Blakely ap-

pears at first blush. First of all, the Supreme Court in Footnote 9, that majority decision indicates that it's not addressing whether [87] it applies to federal sentencing guidelines, does not make that finding. As pointed out by both—several of the decisions, dissenting decisions, there is case law precedent that appears to be inconsistent with Blakely, if Blakely were to be applied to the federal sentencing guidelines. That is what I'd like the chance to point out to the court, how those cases which are still good law, the Supreme Court did not explicitly reverse those cases. Those cases are—some of them are cited in my memorandum, the Witte case, the Edwards case, there's also the Watts case, all of those cases are actually cited both by Justices—Chief Justice Rehnquist and by Justice O'Connor. Those cases apply to sentencing guidelines and the enhancements in the sentencing guidelines and permit the court to do that at the time of sentencing. And while at first blush appear inconsistent to Blakely, I would like the opportunity to be able to explain to the court with further reflection myself as to why they are different.

The other point is that the Supreme Court did not do an analysis of the differences between the Washington sentencing guidelines and/or sentencing statutes and the federal sentencing guidelines, and I have not had a chance to do that piece of it because that takes an additional amount of work, but I am prepared to argue to the court, [88] would like to argue in more detail as to why Blakely does not apply, but I again would ask the court allow us briefing time.

THE COURT: Let me hear the full benefit of your argument, then I'll reserve whether we'll do briefing as well.

MS. KAZANJIAN: Again, I'm not sure I'm able to give the court everything that there is out there. But first of all, I think that United States did argue in the context of Blakely that the Washington system was different from the federal sentencing guidelines for several reasons. Unlike the Washington system, the federal sentencing guidelines were not—the guidelines were not enacted by the legislature, but promulgated by the Sentencing Commission, and that is an independent Commission in the judicial branch of the United

States, and that is Supreme Court decision of Mistretta v. United States, 488 U.S. 361, cited for that proposition. The guidelines are not statutes, but sentencing rules, they are a unique product of a special and limited delegation of the authority of the Commission, and I think this should be treated—they should be treated differently.

The Washington system is, I know enough to know from sources that I'm relying on in the Department of Justice [89] that the system and the federal guidelines are somewhat different. The guidelines do not establish statutory maximum for criminal offenses. Federal system in contrast to the Washington system, the offense of conviction does not dictate a sentencing range, the sentencing range is only determined after the various factors are figured in. And it is at that point that a range is established. My understanding is it differs in that respect, again, I have not had a substantial amount of time to analyze how those statutes work, but I believe they do differ in that respect. I think the court should mostly look at the fact that the Supreme Court precedent of Witte, Watts, Edwards, Mellon, all have been—not been explicitly reversed by the Supreme Court, by the majority decision, even the dissenting decisions don't indicate they have been reversed, they raise concerns about squaring those decisions and the consistencies and how it's going to apply going forward, but nobody suggests those decisions are no longer good law. In this particular case, the Edwards decision that I cite in my memorandum is right on point, it does authorize the court to take into consideration factors such as relevant conduct and to factor in the relevant conduct in the determination of the guidelines. The court under Edwards as well as the Witte and Watts [90] decisions backing it up can look at for example the crack cocaine, any cocaine that was outside the conspiracy period, factor that in as a matter of sentencing pursuant to the sentencing guidelines. It would seem to be a huge step for this court to in the face of even the majority saying that it's not indicating that this applies to the federal sentencing guidelines, the court to apply it under these circumstances in this case in effect, ignoring that precedent, which is, does deal directly

with the federal sentencing guidelines by the Supreme Court, and does deal directly with the issue of relevant conduct and other types of enhancements. Again, those cases standing for the proposition that uncharged conduct, even acquitted conduct, can be factored in by the court in determining the offense level for which the defendant should be sentenced by. And again the way the guidelines operate, all of those factors are to be figured in before there is ever a range, before a range is ever determined. So there is no such range that is capping this defendant's sentence as there was under the Washington sentencing scheme. In this particular case, I think the Supreme Court has said over and over in dealing with Apprendi issues that the maximum statutory penalties are set forth in Title 21, Section 841, in this case, it's Section 841(b), that is **[91]** always the—considered to be the maximum statutory penalty. This sentence would not exceed that, it's a 40 year maximum statutory penalty. And there would be no violation of the Apprendi rules for the court to impose a sentence within the guideline range that it has determined today applies. That's the best I can do for the court today.

THE COURT: Thank you, Ms. Kazanjian. Defense counsel.

MS. SCAPICCHIO: Thank you, Your Honor. Judge, I interpreted Blakely a little bit different in terms of the definition of statutory max. I understood Blakely, the Blakely court to define statutory max as the maximum a Judge may impose based solely on the facts reflected in the jury's verdict or admitted by a defendant. In this case, that would limit the statutory max to what the jury heard in this case and all the jury heard from which they could consider is the evidence relative to the conspiracy. So I think that Blakely applies the rule of Apprendi and Ring and sweeps a little more broadly in terms of what the court is able to do under the sentencing guidelines. I'm not sure as I stand here today whether or not Blakely invalidates the guidelines. I do believe, however, that what Blakely clearly says is that any fact that wasn't **[92]** pled to the jury, proved beyond a reasonable doubt, that would increase a defendant's sentence

beyond what the jury found is improper now under Blakely, and I think that encompasses anything—with respect to role in the offense, anything with respect to relevant conduct, anything with respect to criminal history category, that wasn't presented to a jury and proven beyond a reasonable doubt. Under that scenario, Judge, I think this court is limited to sentencing Mr. Fanfan to what the government proved in this case to a jury beyond a reasonable doubt. In my understanding of what the government proved to a jury beyond a reasonable doubt is simply a conspiracy to distribute cocaine hydrochloride, without any reference at all to crack cocaine, and without any reference at all to any of the other sentencing factors that we've argued before you here today. I think under Blakely, all of that is gone. And I think Blakely applies Apprendi to mean what it says it means as far as a defendant's right to have a jury determine what he's guilty of and to have the government prove to a jury what they want to include in sentencing. I think what Blakely does most is to force the government to present to the jury everything that it wants it to consider in terms of sentencing. And this case, the government presented no evidence as far as crack cocaine to **[93]** the jury, presented no evidence as far as relevant conduct to the jury from which the jury could consider and render a verdict that is now based upon what this court can sentence. So I think that under Blakely, we're stuck with what the government proved at trial, and what the government proved at trial simply amounts to a conspiracy to distribute 500 grams of cocaine hydrochloride. I also believe, Judge, that because there wasn't a specific verdict, an amount found by the jury of 500 grams, that Mr. Fanfan is entitled under Blakely and under Apprendi in this case to the lowest possible sentence that the court can impose.

THE COURT: Well, there was a finding.

MS. KAZANJIAN: Yes, there was a finding.

MS. SCAPICCHIO: Of 500 grams?

MS. KAZANJIAN: Yes.

MS. SCAPICCHIO: I didn't have within the papers I had, I apologize for that.

THE COURT: While you're on that, there is a finding, whether it meets Colon-Solis is a separate question. There was a finding, I think you'll have to go back and look at the jury instructions, but I think it would reflect the scope of the conspiracy—

MS. SCAPICCHIO: Right, I think that's what it was, Judge, the finding by the jury in this case of 500 grams—thank you. If the jury, if the jury in this **[94]** case did find that Mr. Fanfan was responsible for distributing or conspiring to distribute cocaine, 500 grams or more, there still has to be an individual determination as to what Mr. Fanfan's accountability is. I don't think we can tell that from this jury verdict as far as what the jury might have thought Mr. Fanfan was accountable for was what was foreseeable as far as Mr. Fanfan is concerned, I think is something that Blakely has considered, and Blakely has said unless it's clear from the jury verdict, Mr. Fanfan gets the benefit of leniency in terms of sentencing. So I would suggest --

THE COURT: Wouldn't that be harmless error, however, here in light of the fact that all the testimony was that he was the only source? In other words, this is not like the typical conspiracy where other people might have been dealing with amounts that did not come from him.

MS. SCAPICCHIO: Well, Judge, I think that we get back to this issue of foreseeability and the issue of Blakely as to what the jury—we don't know as we stand here today how the jury came up with their verdict that Mr. Fanfan was responsible for 500 grams or more of cocaine hydrochloride. Because we don't know that, and we don't know what process they went through to reach that, we can't say with any degree of certainty that they didn't include other amounts that weren't necessarily attributable to **[95]** Mr. Fanfan under the conspiracy, amounts attributable to Ash or Smith in this case, in coming up with their verdict.

THE COURT: When he was arrested, he had 1.25 kilos of powder in his possession.

MS. SCAPICCHIO: Conspiracy ended, Judge, that can't be considered, the conspiracy ended at that point. The jury verdict was on the conspiracy alone. None of the stuff that he's found with at that—in that parking lot ever gets before the court under Blakely because the conspiracy ended. And if the conspiracy ended, and that information was introduced to the jury, but not considered by them in finding him guilty in this case, then you do have a problem of what Mr. Fanfan is accountable for under Blakely. And I think because this case doesn't charge Mr. Fanfan with the substantive offense of anything that may have happened in Somerville in this case, the court is stuck with what the jury found in this case, which is 500 grams of cocaine hydrochloride, exclusive of any of the crack cocaine or any of the other substances that are attributed directly to Fanfan at the arrest. Thank you.

THE COURT: Thank you. Any rebuttal?

MS. KAZANJIAN: No, Your Honor, only—well, I'll only state that the jury did, was instructed, did find 500 grams or more in the verdict.

[96] THE COURT: What about the Colon-Solis issue that raises. In other words, the First Circuit has said that in other contexts, just because the jury finds a scope of conspiracy that the sentencing Judge pre Blakely has an obligation to find that was reasonably foreseeable for this defendant as to how much he or she should be saddled with under relevant conduct, is that an issue now given Blakely?

MS. KAZANJIAN: No, I don't think Blakely affects that, I mean, first of all, that is the—an issue for sentencing according to the First Circuit, Blakely doesn't address that type of issue, it addresses issues that are enhancements under a sentencing structure. And I think the point that it's harmless error is actually accurate, worst case here, we have evidence that—clear evidence that Mr. Fanfan was the only source for all of the cocaine that was part of this conspiracy, and it was proved, and therefore, there's no way the jury could have found otherwise.

THE COURT: Thank you, Ms. Kazanjian.

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